No. 93-70

In the Supreme Court of the United States

OCTOBER TERM, 1993

Supreme Court, U.S.
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OREGON WASTE SYSTEMS, INC., AND GILLIAM COUNTY, OREGON, PETITIONERS

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON AND ENVIRONMENTAL QUALITY COMMISSION OF THE STATE OF OREGON, RESPONDENTS

On Petition For A Writ Of Certiorari To The Supreme Court Of The State of Oregon

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Oregon Supreme Court upheld the facially discriminatory fee at issue in this case on purely legal grounds: it determined that state user fees are valid under the Commerce Clause as long as the amount of the fee is not "manifestly disproportionate" to the State's costs. Under the Oregon court's view, even if the fee discriminates on its face against interstate commerce there is no need to determine whether the State has a legitimate reason for imposing a disproportionate financial burden on interstate commerce, because the fee would be valid under the Commerce Clause even if the State has no justification for the discriminatory exaction.

Oregon does not even attempt to mount a defense of the merits of that legal determination; the brief in opposition does not contain *any* response to our arguments (Pet. 12-20) that the decision below is directly contrary to this Court's precedents, which forbid any sort of discriminatory state exaction. And Oregon does not dispute our submission that the correctness of the state court's special legal standard for user fees is a significant question warranting this Court's attention. Indeed, Oregon expressly concedes that the legal question is "important" (Opp. 3).

Apparently unable to justify the legal rule adopted by the state supreme court, Oregon instead devotes its entire brief in opposition to obfuscation, creating a series of procedural arguments designed to convince this Court that the legal question is not properly presented in this case. In making these arguments, Oregon is walking a procedural tightrope. To defeat certiorari, the State must create the impression that there was some procedural deficiency in the decision below -- the parties challenging the discriminatory fee lacked standing or the lower court's ruling was dictated by the narrow scope of review or the lack of a factual record. But if the State were to commit forthrightly to any of those positions, it would undermine the State's attempt to foreclose relitigation on the ground that the decision below inclusively

determined the matter. Thus, Oregon has phrased its arguments very carefully -- for example, petitioners did not lack standing to challenge the discriminatory fee, but their standing is "uncertain" because "the record" does not reflect their injury (Opp. 5).[1]

This Court should not allow Oregon to execute a judicial "squeeze play," defeating certiorari by creating the impression that the Oregon Supreme Court's decision suffers from procedural defects and then preventing relitigation of the Commerce Clause discrimination claim on the ground that it was conclusively resolved by the Oregon Supreme Court. There is no substance to Oregon's procedural smokescreen. The Oregon Supreme Court squarely decided an important question of federal law as to which the lower courts are in conflict. The correctness of that ruling is cleanly presented in this case. The petition for a writ of certiorari should therefore be granted.

A. Petitioners Plainly Have Standing To Challenge The Discriminatory Fee.

Oregon first asserts (Opp. 5) that the Court should deny review because petitioners' standing to press their Commerce Clause claim is "uncertain." That contention is preposterous on its face. Petitioner Oregon Waste Systems ("OWS") is challenging the constitutionality of a tax *that it is obligated to pay* under Oregon law. See Or. Rev. Stat. § 459.297 (1991). Paying the tax will, of course, leave "petitioner poorer in an absolute sense than before." *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 48 (1990). That direct financial burden -- which is clear from OWS's status as the operator of a waste disposal facility (as alleged in the petition for review) and from the express requirements of the statute -- plainly is sufficient to satisfy federal standing requirements.

Oregon's apparent contention (Opp. 6) that OWS must also demonstrate harm to its business seems to stem from the State's belief that OWS might be able to avoid injury by passing on the unconstitutional tax to its customers. The State thus asserts that petitioners "were not required in state court to show any actual injury and the record in fact reflects none." Op. 5.[2] It rests this contention on the proposition that "there is nothing to suggest that the [discriminatory] fee renders the in-state landfill less competitive than landfills in other states or that any solid waste has been or is likely to be diverted to out-of-state competitors." *Id.* at 6. But the State's contention is the one that has no support in the record: the State cannot argue away the direct financial injury to OWS caused by a law obligating the company to pay money to the State. That clear burden on OWS could possibly be overcome only by a factual showing that OWS in fact would bear no increased costs -- and would not suffer decreased

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[1] Indeed, Oregon very carefully avoids casting doubt on the preclusive effect of the decision below, asserting only that "*[p]etitioners* apparently do not believe" that the decision below precludes relitigation of the Commerce Clause claim (Opp. 14 n.11) (emphasis added), but saying nothing at all about the State's position regarding that issue. By expressly acknowledging that petitioners may still claim that the fee is excessive (Opp. 10), but saying nothing about petitioners' claim that the fee discriminates against interstate commerce, the State provides an indication of the position it plans to take in subsequent proceedings.

[2] Oregon law in fact requires a demonstration of likely injury. See, *e.g.*, *Gruber* v. *Lincoln Hosp. Dist.*, 588 P.2d 1281, 1284 (Or. 1979) ("a taxpayer's standing as such to demand equitable relief in his own name in Oregon has depended on allegations that the challenged governmental action had actual or potential adverse fiscal consequences"); *Hanson* v. *Mosser*, 427 P.2d 97, 101-102 (Or. 1967).

revenues -- as a result of the tax. There is no such evidence here.[3]

And it is inconceivable that the State could make such a showing. As this Court has explained, a tax that violates the Commerce Clause by discriminating against out-of-state taxpayers

> place[s] [such a taxpayer] at a relative disadvantage in the marketplace vis-a-vis competitors distributing preferred local products. * * * To whatever extent [the out-of-state taxpayer] succeeded in passing on the economic incidence of the tax through higher prices to its customers, it most likely lost sales to favored distributors or else incurred other costs (*e.g.*, for advertising) in an effort to maintain its market share.

McKesson, 496 U.S. at 48 (footnote omitted).

Finally, the State's argument is also beside the point. A taxpayer's ability to mitigate the effects of a discriminatory tax by passing the burden on to someone else does not deprive the taxpayer of standing to challenge the constitutionality of a levy that it is obligated to pay. See generally *McKesson*, 496 U.S. at 46-48 (holding that the

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[3] The rulemaking record indicates that the State could not make such a showing. Indeed, the Department of Environmental Quality (DEQ) found that landfill operators like OWS *would* lose business as a result of the discriminatory fee. In promulgating the regulation containing the fee, DEQ opined that "it is difficult to quantify what the resulting decrease in disposal volumes [of out-of-state] waste might be," but went on to hypothesize that a $1.50 per ton surcharge would decrease volume at a typical landfill by 36,000 tons, "resulting in a revenue loss of $900,000 (@ $25/ton) to the landfill operator." *Rulemaking Statements for Proposed Revisions to Existing Rules Pertaining to a Surcharge on Out-of-State Solid Waste*, *reprinted in* OWS Ct. App. Pet. for Review at A-17.

possibility of such a pass-through does not vitiate a state's obligation to refund a tax "that is unconstitutional because it is discriminatory"). The direct financial burden imposed on OWS by the discriminatory tax plainly is sufficient to satisfy the standing requirement of Article III.

B. The Oregon Courts' Scope Of Review Had No Effect Whatever On Their Disposition Of the Discrimination Claim.

Oregon's principal argument is that the procedure expressly provided under Oregon law for reviewing the constitutionality of the discriminatory fee somehow skewed the lower courts' disposition of this case. The State intimates that the judgment below is a product of the limits on those courts' authority. The Oregon Supreme Court's opinion itself demonstrates that simply is not true.[4]

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[4] The State repeatedly intimates (Opp. 3, 5, 9 n.8) that petitioners chose the expedited review procedure available under Oregon law in order to gain some unfair advantage. There is no basis to that claim. Oregon law precluded petitioners from challenging the rule directly in a state trial court. See Or. Rev. Stat. § 183.400(2) (1991); *Hay* v. *Department of Transportation*, 719 P.2d 860 (1986). Petitioner OWS, for example, would have had to refuse to pay the tax and then either seek review of the assessment or await an enforcement action. See Or. Rev. Stat. §§ 183.415 & 459.376. In either case, OWS could have been liable for civil and criminal penalties, including suspension or revocation of its disposal facility permits. *Id.* §§ 459.992-459.995; Or. Admin. R. 340-14-045. OWS preferred to utilize a review procedure that would not threaten such onerous consequences.

Two other routes were not certain to yield a decision. Although the state Environmental Quality Commission may issue declaratory rulings (Or. Rev. Stat. § 183.410), it has absolute discretion to decide whether to entertain such a proceeding. That body -- which promulgated the rule at issue -- had considered and rejected Commerce Clause challenges during the rulemaking

The Oregon Supreme Court considered two bases under which the discriminatory fee may be invalid under the Commerce Clause. First, whether it discriminated against interstate commerce without justification "'both in terms of the local benefits flowing from the [fee] and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009, 2014 (1992) (citation omitted). Second, whether the amount of the fee was manifestly disproportionate to the services rendered by the State.

The state supreme court declined to address the second issue, stating that "[s]uch a claim cannot be adjudicated in the present proceeding. *Our scope of review under ORS 183.400 precludes us from deciding* whether the surcharge is impermissible as 'disproportionate' to the services rendered or to the costs incurred by the State of Oregon in connection with permitting waste disposal sites to accept solid waste generated out of state, because those are factual inquiries." Pet. App. 18a-19a (emphasis added).

The Oregon court did not disclaim its ability to decide the discrimination claim. It instead squarely and unequivocally rejected petitioners' contention that the fee discriminates against interstate commerce in violation of the

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process and therefore appeared most unlikely to entertain a constitutional challenge to the rule's validity. An action in federal district court would not have allowed petitioners to raise their state-law challenges to the fee (see Pet. App. 6a-7a) because of the restrictions imposed by the Eleventh Amendment and such an action almost certainly would have become enmeshed in the complexities of the Tax Injunction Act's limits on the power of the federal courts to grant relief in cases challenging state taxes (see 28 U.S.C. § 1341). All in all, the expedited review process appeared to petitioners to be the most appropriate approach. If the state courts could not address some issue because of limits on their jurisdiction, the issue then could be pursued in another forum.

Commerce Clause. *And it did so for a reason not tied to the particular facts of this case*. The court determined that the applicable legal standard precluded the discrimination claim:

> A law imposing a compensatory fee for costs incurred by a state in supervising and regulating the activities of an entity engaged in interstate commerce is *prima facie* reasonable. Such a law violates the Commerce Clause only where the amount of the fee is "manifestly disproportionate to the services rendered."

Pet. App. 18a (citations omitted). Thus, the Oregon Supreme Court rested its rejection of the discrimination claim entirely on legal grounds not linked in any way to the Oregon courts' limited review of factual questions. The question presented in the certiorari petition is whether that legal ruling is correct. Because the Oregon Supreme Court's own opinion demonstrates beyond doubt that the court did not believe itself limited by the scope of review in deciding the discrimination claim, there is no reason this Court should be.

C. The Absence Of A Factual Record Was Irrelevant To The Decisions Below And Is Irrelevant To The Question Presented In The Certiorari Petition.

Oregon also asserts (Opp. 8) that the Court should not grant review because there is no factual record establishing the actual effect of the discriminatory fee on interstate commerce. Again, however, the legal principle adopted by the Oregon Supreme Court -- and challenged in the certiorari petition -- has nothing to do with the particular discriminatory impact of this or any other user fee. That court's rule is a blanket exemption from ordinary Commerce Clause discrimination analysis for *all* user fees. The correctness of that rule is a legal question that does not depend on any particular set of facts.

And, contrary to Oregon's claim (Opp. 11), the conflict between the Oregon court's view of that question and the determination by the Seventh Circuit in *Government Suppliers Consolidating Service* v. *Bayh*, 975 F.2d 1267 (7th Cir. 1992), cert. denied, 113 S. Ct. 977 (1993), has nothing whatever to do with the alleged existence of a factual record in the latter case. *Government Suppliers* was a facial challenge, just like this case, and there was no evidence regarding the impact of the discriminatory Indiana fee before the Seventh Circuit because *the fee had never gone into effect* (indeed, the amount of the fee had never even been set). 975 F.2d at 1271-1272, 1281-1282. Thus, Oregon's purported distinction between the present case and *Government Suppliers* is simply wrong; the two cases were in precisely the same procedural posture. The conflict is indisputable (a fact confirmed by Indiana's decision to file an amicus brief supporting certiorari here).

The facts that Oregon identifies, moreover -- such as "the effect[] of the Oregon surcharge on interstate commerce" (Opp. 8) -- do not relate to the legal standard adopted by the Oregon Supreme Court. The existence of a discriminatory burden on interstate commerce is irrelevant under that test. Rather, these facts would have become relevant only if the Oregon court had applied the correct legal standard, which requires an inquiry into whether the fee discriminates against interstate commerce and whether that discrimination is justified by some cost differential between in-state commerce and interstate commerce (see Pet. 12-20).

At that point, the Oregon court would have faced two choices. It could have concluded that a factual record was not necessary to hold the discriminatory fee unconstitutional under the Commerce Clause. Given the express imposition of a burden only on interstate commerce and the fact that the Oregon statute requires the fee to be set at a level that would recover all costs not covered by other disposal charges, not simply those costs unique to interstate waste (see Or. Rev. Stat. § 459.298 (1991)), the measure is clearly unconstitutional. See Pet. 18-20.[5] For example, the Seventh Circuit did not require any record regarding the actual effects of the fee in order to hold the Indiana fee unconstitutional on its face. And this Court has never indicated that evidence of the actual effect of a facially discriminatory law is necessary in order to hold it unconstitutional under the Commerce Clause.

Alternatively, the Oregon court could have concluded that factual development was needed, and declined to address the discrimination claim, just as it declined to address the excessiveness claim (see page 6, *supra*). What the state court could not do is what it did here: reject petitioners' discrimination claim on the basis of a patently incorrect legal ruling. This Court should correct that error.[6]

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[5] Oregon hints (Opp. 9) that the state courts could not even determine whether the fee discriminated against interstate commerce because they could not conduct a "meaningful" examination of the other fees and taxes on in-state waste generators. Because all of these measures are embodied in statutes and regulations, and the Oregon procedure plainly permits courts to examine other laws (see, *e.g.*, Pet. App. 10a, 12a-13a), it seems most unlikely that a court could not resolve that question, at least to the extent of determining whether any of these other measures satisfy this Court's test for "compensatory taxes" that may eliminate the discriminatory effect of measures targeting only interstate commerce. See, *e.g.*, *Maryland* v. *Louisiana*, 451 U.S. 725, 758-760 (1981). (The passage of the Oregon Court of Appeals decision quoted by the State (Opp. 9 n.7) does not discuss that inquiry, but rather appears to relate to the sort of agglomeration of tax burdens on in-state commerce that this Court specifically rejected as a matter of law in *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266, 287-289 (1987). Indeed, the Oregon Court of Appeals specifically indicated that its decision did *not* rest on the compensatory tax doctrine. Pet. App. 39a & n.18.) In any event, the Oregon Supreme Court did not rest its decision on the ground that the fee did not discriminate. It held that any discrimination was legally irrelevant. That is the legal question presented to this Court for review.

[6] Thus, this Court does not face the choice posed by Oregon (Opp. 12-13) between holding the discriminatory fee

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Finally, Oregon includes in its roundup of procedural arguments the routine assertion (Opp. 13-15) that the petition should be denied because other cases will better present the issue raised here, including other lawsuits filed by petitioners. That contention is quite disingenuous. As we have discussed (see page 2 & n.1), Oregon undoubtedly will invoke the decision below to attempt to *preclude* any further litigation regarding the claim that the fee discriminates against interstate commerce in violation of the Commerce Clause. If this Court were to deny certiorari, petitioners may not have another opportunity to obtain review of that question.

To the extent Oregon means to refer to other parties challenging this or similar discriminatory fees, there simply is no reason for this Court to wait. As the amicus briefs point out, the legal rule adopted by the Oregon Supreme Court has the potential to create a great deal of uncertainty and confusion with respect to the Commerce Clause standards governing *all* user fees. That is especially true given the square conflict with the Seventh Circuit decision. State legislatures and businesses need guidance now regarding the governing legal rule. And the correctness of the Oregon court's approach is squarely presented in the case before the Court. The Court should act now to resolve this important legal question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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unconstitutional in all circumstances or holding the fee valid. The Court could address the important question of law -- whether user fees must pass muster under the anti-discrimination standard applicable to other state exactions -- and either apply the discrimination test itself or, if it has questions about the state of the record, remand to the Oregon courts for application of that test (or a decision that the issue cannot be resolved in this proceeding).

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